No. 16,041

United States Court of Appeals
For the Ninth Circuit

CHARLES E. SMITH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLEE.

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JURISDICTIONAL STATEMENT.

On October 29, 1957, the appellant was indicted by the Grand Jury for the Third Judicial Division, District of Alaska, along with James Burton Ing, Raymond Wright, John Walker, Dewey Taylor and Lemuel Ashley Williams in a twenty count Indictment charging the defendants with uttering and publishing forged checks in violation of Section 65-6-1 ACLA 1949 (R 3-22). The appellant was named in Counts I through V only. The trial of the appellant was completed on February 28, 1958. The appellant was found guilty on Counts I, III, IV and V, and not guilty on Count II (R 24). On March 3, 1958,

appellant was sentenced to imprisonment for five years on each of the four counts of which he was convicted to run concurrently, with two years suspended on condition he make restitution (R 25, 26).

The trial Court had jurisdiction of the Indictment and trial under the provisions of Sections 53-1-1, 53-2-1, 65-6-1 ACLA 1949. Jurisdiction is conferred on this Court by Sections 1291 and 1294, Title 28, U.S.C.

STATEMENT OF FACTS AND PROCEDURE.

On Thursday, March 14, 1957, a complaint was filed by the United States Attorney in the office of the United States Commissioner, District of Alaska, Anchorage Precinct, Anchorage, Alaska, charging the appellant of the crime of forging and uttering a forged instrument, in violation of Section 65-6-2 ACLA 1949 (R 295, 296, 297). A warrant for the appellant's arrest was issued on the same day (R 294). The appellant was arrested at his parents' home in Renton, Washington, at about 3:30 P.M. on March 15, 1957 (R 137-147). A Lt. Wayland of the King County, Washington, Sheriff's Office, Lt. William Trafton, Territorial Police Officer, Special Deputy Marshal Ted Pass, and Edward J. Harkabus, a special agent for the National Board of Fire Underwriters, were present when the appellant was taken into custody (R 138). The appellant arrived at the King County Jail about 4:30 P.M. (R 147). The appellant was interviewed briefly by Officers Trafton and Pass at the King County Sheriff's Office on Fri-

day, March 15, 1957 (R. 147). The appellant was warned that he did not have to make a statement and that he was entitled to the services of an attorney by Officer Pass (R 148, 150). Appellant apparently signed a waiver of extradition around 6:00 P.M. on Friday evening. The appellant testified that he was interviewed by Officers Trafton and Pass for about one hour on Saturday, March 16, 1957 (R 198, 199). Although not clear, there is some indication that there was an attempt on March 16, 1957, to arraign the appellant (R 174). On Sunday, March 17, at about 2:00 P.M., appellant was interviewed by Trafton, Pass and Harkabus at the King County Jail (R 151, 152). No threats or promises were made by any of the officers to the appellant (R 132). About 45 minutes after the interview began, the appellant made his first admission (R 153). The appellant had a conference with Mr. Harris, an attorney retained by the appellant's father, on Sunday afternoon prior to signing his statement (R 159, 160). The appellant admitted he signed nothing until he saw his attorney (R 204). The appellant told Mr. Harris that he didn't care to talk to him in private (R 160). The appellant admitted that no one prevented him from requesting a private conference with his attorney (R 210). Later in the afternoon, the appellant's statement (Pl.Ex. 20) was typed by Mr. Harkabus and was signed by the appellant (R 163), after reading over the statement and making corrections (R 164). The appellant was arraigned in Seattle by United States Commissioner John Burns on Monday, March 18, 1957, on the

complaint filed in Anchorage (R 173, 299, 300, 301). At the arraignment in Seattle, the appellant was represented by counsel. The complaint was read and explained to him (R 173, 300). The appellant was released to Alaskan authorities and returned to Anchorage where he was again arraigned by a United States Commissioner on March 21, 1957. The Commissioner read the complaint to the appellant and advised him of his rights (R 294, 295). At this hearing, the appellant waived preliminary hearing (R 295).

On March 27, 1957, the appellant was interviewed by Officer Dankworth at the Territorial Police Office in Anchorage concerning another matter (R 249). At this interview, the appellant volunteered certain oral statements to Mr. Dankworth concerning his implication in the crimes of which he was convicted (R 252-255). The appellant told Mr. Dankworth at this interview that he desired to plead guilty (R 252).

At the trial, the appellant objected to the admission of Plaintiff's Exhibit 20 for identification (R 121). The trial Judge sustained the objection on the ground that Rule 5 of the Federal Rules of Criminal Procedure had been violated, for the reason that four days had elapsed since the date of arrest and the date of first arraignment (R 227). The appellant objected to the testimony of Mr. Dankworth concerning the oral admissions made by the appellant on March 27, 1957. The Court overruled this objection (R 250). The appellant made a motion to strike the testimony of Mr. Dankworth (R 257) which was denied by the Court (R 264, 265).

The attorney for the appellant said, in a hearing on the instructions, the following:

> "Only your Honor, to except to the failure of the Court to give any instruction to the effect that admissions made by a defendant while in custody must be voluntarily and that the burden of proving the voluntary nature of the statements is on the government and I realize I didn't submit one on those points, your Honor, and—well, that is all I have to say." (R 334)

The Court instructed that the testimony of the oral admissions of a party should be viewed with caution (R 327).

The appellant, prior to trial, moved under the provisions of Rule 16, Federal Rules of Criminal Procedure, for inspection of his written statement (Plaintiff's Exhibit 20 for identification). The Court denied the appellant's motion (R 51).

During closing argument, the United States Attorney stated (R 271):

> ". . . Now there's also much innuendo about the reliability about the Government's evidence. I say, and you know, it's the only evidence you have. If they didn't feel that it was reliable, why didn't they put on some evidence? Why didn't they put some evidence on? You have no choice; you have no evidence or no testimony other than that adduced by the Government witnesses, and by the Government . . ."

The counsel for the defendant, Ing, objected to the remarks (R 271). This objection was overruled (R 271).

ARGUMENT.

I. THE TRIAL COURT DID NOT ERR IN ADMITTING THE TESTIMONY OF OFFICER DANKWORTH CONTAINING ADMISSIONS MADE BY APPELLANT ON MARCH 27, 1957.

A. The trial Court erred in refusing to admit Plaintiff's Exhibit 20 for identification as having been taken in violation of Rule 5(a), Federal Rules of Criminal Procedure.

The appellant contends in his brief (pp. 22-29) that Plaintiff's Exhibit 20 for identification was taken in violation of Rule 5(a) of the Federal Rules of Criminal Procedure. From that point, he argues that the oral admissions made some ten days after the first statement were the fruits of his allegedly inadmissible statement. In this regard, he tries to rely on the *McNabb, Carignan, Leyra v. Denno, Silverthorne Lumber Co., Mallory* and *Nardone* cases, among others, to establish his contention.

A careful examination and analysis of the authorities relied upon by the appellant in his brief reveal that they do not support his contention as applied to the facts in the instant case. In the case of *McNabb v. United States,* 318 U.S. 332, 345 (1943), the Court stated:

> ". . . The mere fact that a confession is made while in custody of police does not render it inadmissible . . ."

In the *McNabb* case, *supra,* the defendants were arrested without a warrant, brought to a bare detention room in the Federal Building where they could neither sit nor lie down for about 14 hours, from 3:00 A.M. until 5:00 P.M. in the afternoon. They were not permitted to see relatives and friends who attempted to visit them. They had no lawyer. There was no evidence that they

requested assistance of counsel, or that they were told that they were entitled to such assistance. The questioning by six officers continued until 2:00 A.M. Saturday morning. In that case, it was obvious that the defendants could have been arraigned promptly and were not. In the case at bar, the appellant was promptly informed of his rights and advised that he was entitled to the services of an attorney (R 148, 150). The appellant was arrested pursuant to a warrant signed by the United States Commissioner (R 294). The appellant apparently received legal advice before signing his statement (R 159, 160, 204). The appellant was arraigned in Seattle during normal business hours and again advised of his rights and had assistance of counsel (R 173, 299, 300, 301). The record is devoid of any coercion or prolonged questioning or third degree methods. The *McNabb* case could not be applied to the facts here under any logical stretch of one's imagination.

In *United States v. Carignan,* 342 U.S. 36 (1951), referred to by appellant on page 21 of his brief, the Court reversed this Court in part in a case of Alaskan origin by refusing to extend the *McNabb* rule to interrogation conducted while the defendant was in legal custody. It would appear that this case supports the contention of the government that it was error for the trial Judge to exclude the appellant's confession.

The appellant relies heavily on the case of *Mallory v. United States,* 354 U.S. 449, 450 (1957). In that case, the defendant was arrested, apparently without a warrant, early in the afternoon and was detained at police headquarters within the vicinity of numerous

committing magistrates. He was not warned of his right to remain silent or advised that he had right to counsel. In this case, the appellant has made no showing that he could have been arraigned before Monday. In this case, the appellant was warned of his rights at the outset and had advice of counsel.

The appellant cites the case of *Leyra v. Denno, Warden,* 347 U.S. 556, 561 (1954). In that case, the Supreme Court found that a subsequent confession taken by state authorities within five hours after an admittedly coerced and involuntary confession taken by state authorities violated the due process clause of the Fourteenth Amendment. The defendant had been questioned for days and nights for a period of nearly five days without counsel. A psychiatrist, paid by the state, posing as a general practitioner to treat the defendant's sinus condition, utilized methods approaching mental coercion, finally obtained a confession from the defendant. Justice Black described the subsequent statement as follows:

> ". . . All were simply parts of one continuous process. All were extracted in the same place within a period of about five hours as the climax of days and nights of intermittent, intensive police questioning. First, an already physically and emotionally exhausted suspect's ability to resist interrogation was broken to almost trance-like submission by use of the arts of a highly skilled psychiatrist. Then the confession petitioner began making to the psychiatrist was filled in and perfected by additional statements given in rapid succession to a police officer, a trusted friend, and two state prosecutors. We hold that use of con-

> fessions extracted in such a manner from a lone defendant unprotected by counsel is not consistent with due process of law as required by our Constitution . . ."

In the instant case, there was an interval of ten days, rather than five hours, between the first allegedly inadmissible statement and the subsequent admissions. In this interval, the appellant was represented by counsel and was repeatedly warned of his rights. He nevertheless volunteered the admissions at an interrogation involving another matter.

The appellant attempts to stretch the decision of the Supreme Court in *Nardone v. United States,* 308 U.S. 338, 341 (1939), to apply to the instant case. The poisonous tree doctrine relating to evidence obtained in violation of Section 605 of the Communications Act of 1934 is not applicable to the facts here and should not be extended beyond its factual context. Justice Frankfurter, in the opinion of the Court, stated as follows:

> "Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint. A sensible way of dealing with such a situation—fair to the intendment of Section 605, but fair also to the purposes of the criminal law—ought to be within the reach of experienced trial judges. The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. Once that is established—as was plainly

> done here—the trial Judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin . . ."

Even if this Court sees fit to extend *Nardone* beyond its factual context, it would appear that the influence of the first confession was so diminished after legal advice and two arraignments as to have no causal connection whatever with the admissions objected to.

The case of *Silverthorne Lumber Co. v. United States,* 251 U.S. 385 (1920), cited by the appellant, does not apply to subsequent admissions, but rather applies to fruits of an illegal search and seizure. This case is not in point and inapplicable here.

The case of *Burwell v. Teets,* 245 F.2d 154 (9th Cir. 1957), cited for its language by the appellant, does not support his contention. This Court, at page 163, found that the confession taken subsequent to the alleged coerced confession made the night before was not part of a continuous process. It should be noted that the prior statements were found to be voluntary.

It is respectfully submitted that the ruling of the lower Court in refusing to admit the appellant's written confession was error. The trial judge failed to comprehend the true and full meaning of Rule 5(a) and the decisions thereunder. In this connection, it should be noted that no proof was presented by the appellant that the appellant could have been arraigned

and that a Commissioner was available for that purpose. Also, the trial Court ignored the fact that the appellant consulted counsel before signing his statement, was warned of his rights, and that there was no duress or third degree methods employed. The government respectfully submits that the appellant was arraigned during normal business hours of the United States Commissioner in Seattle. Moreover, the trial Court failed to recognize that the appellant was arrested on a warrant duly issued.

To determine the true meaning of Rule 5(a), we invite the Court's attention to subsequent authority. This Court, in the case of *Symons v. United States,* 178 F.2d 615, 621 (1950), stated:

> ". . . Rule 5(a) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., requires any person making an arrest without a warrant to take the arrested person without unnecessary delay before the nearest available commissioner. We are not aware of any rule or decision which requires a commissioner to make himself available at all hours of the night for the purpose of hearing evidence against a person arrested by federal officers without a warant. We do not construe the words 'without unnecessary delay' to require that the arrested person be taken before a commissioner except during his regular office hours . . ."

In the recent case of *Porter v. United States,* 258 F.2d 685, 688, 689 (D.C. Cir. 1958), Mr. Justice Reed, in an extended discussion of the *Mallory* decision and Rule 5(a), stated:

> "The statutory direction to 'produce a prisoner before a magistrate without unnecessary delay' is

not a measure as definitive as the standard yard. It did have a background of interpretation, however, when it appeared in the Rules. 'Without unnecessary delay' had been used in New York at least since 1887, Code of Criminal Procedure, Section 165, and in Illinois since 1874, Smith-Hurd Criminal Code, Section 660. Disregard of the duty of arraignment, it was held in *People v. Mummiani,* 258 N.Y. 394, 396, 180 N.E. 94, 95, 'does not avail, however, without more to invalidate an intermediate confession.' *People v. Alex,* 265 N.Y. 192, 194, 192 N.E. 289, 94 A.L.R. 1033. Of course, evidence of illegal detention is admissible on the question of coercion. *People v. Elmore,* 277 N.Y. 397, 14 N.E.2d 451, 124 A.L.R. 465. Thus they differ from the federal rule.

Both New York and Illinois recognize that the rule for production 'without unnecessary delay' is during the ordinary professional hours of commissioners and judges.

> 'Furthermore, his detention was not unlawful, for section 7, of division 6 of the Criminal Code, Ill. Rev. Stat. 1947, Chap. 38, par. 660, does not require that courts of committing magistrates shall be open on Saturday night, Sunday, and Sunday night in order to enable peace officers to bring an arrested person before one for arraignment when, during all that time, the crime committed has not been fully solved in respect to the identity of other participants, and the arrested person's connection therewith is still under investigation.'

This is the view of the Supreme Court, *Mallory v. United States,* 354 U.S. at page 453, 77 S.Ct. at page 1359. Police detention was willful dis-

obedience of law 'when a committing magistrate was readily accessible.'

We turn now to the application to this case of these rulings. The people and courts of this nation are one in their desire to support police efforts to detect and punish crime, and equally concerned with assuring a defendant of a fair and just trial. The value in enforcement of careful interrogation of suspects is recognized and encouraged until such time as a suspect is taken into custody. The danger of alarm to accomplices or flight by suspects before arrest complicates such preliminary investigations. On arrest the prisoner must be taken before any reasonably accessible magistrate without unnecessary delay. But until there is such an opportunity to reach such an official, the Supreme Court has not held reasonable questioning without more of prisoners must cease. Each case depends upon its own facts as to what is or is not unnecessary delay. . . ."

Justice Reed, who was a retired member of the Supreme Court when the *Mallory* decision was handed down, takes the position that "without unnecessary delay" means that arraignment must take place during ordinary professional hours of commissioners and judges. This reasoning is almost identical with that of this Court in the *Symons* case, *supra.*

Judge Holtzoff clarifies the meaning of "without unnecessary delay" in Rule 5(a) in the recent case of *United States v. Heideman,* 21 F.R.D. 335, 336 (D.C. D.C. 1958) when he said:

"It so happens that I was a member and the Secretary of the Advisory Committee appointed by

the Supreme Court to prepare a draft of the Federal Rules of Criminal Procedure. The records of the Committee will show that the words 'without unnecessary delay' were deliberately chosen and were not to be taken as synonymous with 'immediately' or 'forthwith'. The notes of the Advisory Committee appended to the Rules disclose the intent of the Committee. To be sure, they are not binding on the Supreme Court, but they fulfill the same analogous role as that played by a Congressional Committee report in determining what the Congressional intent was in framing a statute. The notes of the Advisory Committee indicate that the words 'without unnecessary delay' were used as equivalent to 'reasonable time'. The notes cite a number of authorities which discuss the question what constitutes a reasonable time for the purpose of bringing a defendant before a committing magistrate. Some of these authorities sanction a much longer interval of time than is involved in this case."

B. Even if the appellant's written confession was taken in such a fashion as to be inadmissible under Rule 5(a) of the Federal Rules of Criminal Procedure, the oral admissions made by appellant on March 27, 1957, were not the product of the earlier confession.

The record shows that the appellant was arraigned twice, once on March 18, 1957, in Seattle, and again in Anchorage on March 21, 1957. At the earlier arraignment, the appellant was represented by an attorney. At both proceedings, he was advised of his rights and the complaint was read to him. On March 27, 1957, the appellant, during an investigation of another matter, volunteered the admissions in question

to Mr. Dankworth and stated that he desired to plead guilty (R 252). From the record, it appears that there is no causal relationship between the first statement and the one in question. Nearly ten days had elapsed between the two statements. Representation by counsel plus two arraignments defy the argument of appellant that these admissions were tainted. None of the cases cited by the appellant apply to this case. Where the subsequent statement was excluded, it was part of a continuous and uninterrupted chain made shortly after the first statement. Here that chain was clearly broken.

II. THE TRIAL COURT DID NOT ERR IN REFUSING A PRIVATE HEARING TO DETERMINE WHETHER THE ADMISSIONS WERE VOLUNTARILY MADE.

No discussion is made by the appellant of specification of error number two. It would be most enlightening to know on what authority he bases his contention that a hearing is necessary to determine the admissibility of the oral admissions in question. From his brief, it appears that he is relying on his contention that the first statement which he alleges is inadmissible as a violation of Rule 5(a) of Federal Rules of Criminal Procedure produced these admissions. It should be noted that a full hearing was had on that matter (R 131-220). At that hearing, the appellant testified fully as to the circumstances surrounding his first statement. The record is devoid of any offer of proof made by the appellant to show any additional information. The trial Judge allowed a hearing on the

appellant's motion to strike Mr. Dankworth's testimony. For the reasons stated, the appellant's designation is without merit.

III. THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THAT THE ADMISSIONS OF THE APPELLANT MUST HAVE BEEN VOLUNTARILY MADE.

The appellant does not discuss specification of error number three in his brief. At trial, the appellant's counsel did not present an instruction covering the voluntary nature of an admission (R 334). The Court instructed that the testimony of oral admissions of a party should be received with caution (R 327). The language of *Morton v. United States,* 147 F. 2d 28, 31, 32 (D.C. Cir. 1945) indicates that no instruction was necessary on the voluntary nature of an admission, that being a question of law for the Court.

No proper request was made by appellant for such an instruction and therefore, any error which might arise was waived. Since the admissibility of the admission is a question of law at best, it was not a question for the jury and no instruction was necessary.

IV. THE TRIAL COURT DID NOT ERR IN REFUSING TO STRIKE TESTIMONY OF OFFICER DANKWORTH.

This is covered in Point I above.

V. THE REMARKS OF THE UNITED STATES ATTORNEY IN CLOSING ARGUMENT WAS NOT ERROR.

At page 271 of the record, you will find the following comments of the United States Attorney made in final argument:

> "Now, there's also much innuendo about the reliability about the Government's evidence. I say, and you know, it's the only evidence you have. If they didn't feel that it was reliable, why didn't they put on some evidence? Why didn't they put some evidence on? You have no choice; you have no evidence or no testimony other than that adduced by the Government witnesses, and by the Government."

The attorney for the defendant Ing immediately interposed an objection (R 271). The Court overruled the objection (R 271). At that point Mr. Kay stated:

> "They refer to three individuals at this counsel table, and no one else."

No requested instructions to disregard the comments of the District Attorney was made by any of the counsel.

The comments of the District Attorney could not be construed as a comment on the failure of the appellant to take the stand. Any error that was induced was induced by the comments of the counsel for the defendant Ing, in calling to the Court's attention in the presence of the Jury that the comment referred to the three defendants. It appears that the attorneys for the three co-defendants agreed and the Court ap-

proved that the objection of one counsel would constitute objections for the three defendants on trial (R 57). An examination of the authorities in this area would seem to indicate that the remarks of the United States Attorney in this instance would be proper. In the case of *Johnson v. United States,* 5 F.2d 471, 475 (4th Cir. 1925), the Court states:

> "'The defendants complain that in argument the counsel for the government called the attention of the jury to the fact that neither of the defendants had seen fit to take the stand in his own behalf. It does not appear that anything of the kind was done. In enumerating the questions that the jury would have to consider one of the counsel for the government said: 'What is the evidence introduced by the government? Does that evidence tend to prove these men guilty beyond a reasonable doubt? What is the defense offered on their behalf?' At another time, he said: 'Is there any evidence to show that' (a couple of the government witnesses, naming them) 'were not here in the latter part of March or the 1st of April, and that they did not get the alcohol as they were directed? That is the one thing upon which there has been no apparent contradictions.' Then, again, another one of the counsel for the government said: 'I want to call your attention to this opening statement of counsel. And now after the government has presented to you what I think is the strongest case that was ever made out against a man, we have in defense of that only the evidence of the good reputation of some of these defendants.' We see in this nothing but a fair and accurate statement of what had taken place, and there is nothing in the quoted language to

sustain the contention that the government in any way called the attention of the jury to the fact that the defendants did not take the stand."

In the case of *Slakoff v. United States,* 8 F.2d 9, 11 (3rd Cir. 1925), the Court states:

". . . When the entire statement of the prosecutor amounts merely to an argument that the evidence of the government is uncontradicted and unexplained, without necessarily calling attention to defendant's failure to testify, it is not ground for reversal . . ."

In the case of *Lias v. United States,* 51 F.2d 215 at 218 (4th Cir. 1931), the Court held that comment by counsel to the effect that the Government evidence was uncontradicted is not error. See also *Jamail v. United States,* 55 F.2d 216, 217 (5th Cir. 1932); *Bradley v. United States,* 254 Fed. 289, 291 (8th Cir. 1918); *Hunt v. United States,* 231 F.2d 784, 785 (8th Cir. 1956); *State v. O'Brien,* 77 So. 2d 402, 405 (La. 1954); *Banks v. United States,* 204 F.2d 666 (8th Cir. 1953).

In the case of *Hood v. United States,* 59 F.2d 153, 155 (10th Cir. 1932), the prosecutor in final argument stated:

". . . Who says he didn't do it? Who denies . . .".

The Court disposed of the appellant's objection to the language stated above as follows:

". . . This is not tantamount to an assertion that the defendant did not testify to the denial of the transactions. To so construe the remarks it must

> have been plain that only the defendant could have disputed the testimony for the government . . .".

In the case of *Morgan v. United States,* 31 F.2d 385, 388 (7th Cir. 1929) the Court held that the following comments of the prosecutor were proper:

> "What is it counsel wants the Government to produce in his criticism of me in the presentation of this case? What does he want me to do? Does he want me to call Hust and Morgan to the stand before you gentlemen and have them tell you what? No; the criminal laws don't permit it."

In the case of *Lefkowitz v. United States,* 273 Fed. 664, 668 (2nd Cir. 1921), the Court stated:

> "It is only objectionable to comment upon the failure of the defendant personally to testify, and if at the close of the whole case any given point stands uncontradicted, such lack of contradiction is a fact, an obvious truth, upon which counsel are entirely at liberty to dwell. We perceive nothing objectionable on the part of this prosecutor."

In the *Lefkowitz* case, *supra,* the prosecutor stated that certain evidence of the Government was uncontradicted and undenied. Yet the Court found that these statements were proper.

In the case of *Jackson v. United States,* 102 Fed. 473, 487 (1900), this Court stated that the following comment of the prosecutor in argument was not error:

> "Why didn't the defendant put a sworn witness on the stand?"

In the *Jackson* case, *supra,* this Court stated that the language described above does not necessarily imply and would not ordinarily be understood to mean that the prosecutor was commenting on the fact that the defendant had not taken the witness stand.

This Court in the case of *Bilodeau v. United States,* 14 F.2d 582, 586 (1926) found the following comments by counsel were proper:

> ". . . May I ask counsel to show these checks to his client before I read them, and if there is any further action in the matter I have no objection to his having an opportunity to meet them."

In the case of *Robilio v. United States,* 291 Fed. 975, 985 (6th Cir. 1923) the Court found the following comments of the District Attorney proper:

> "Andy Wallace was the spokesman of this partnership, and yet no one goes on the stand and says that the conversation did not occur."

And again:

> "Tyree Taylor says that he had this conversation with Andy Wallace, and no man goes on the stand to deny it—"

and again:

> "Mrs. Taylor says she had these conversations with Andy Wallace, and no one comes before this jury to deny them."

In the instant case, the Government evidence was uncontradicted in all aspects. The comments of the District Attorney merely called attention to this fact.

Nowhere was there any reference made to the failure of the appellant to testify. There is no showing by the appellant that the only evidence available to rebut the Government's case would have to come from him. The only adverse comment was that made by the counsel for the defendant Ing, who apparently at this point in the trial was acting for and on behalf of the appellant. It has been held that the action of the defendant's counsel in misconstruing the comments of the prosecutor cannot be attributed to the Government. See *State v. O'Brien,* 77 So. 2d 402, 405 (La. 1954).

VI. THE TRIAL COURT'S RULING IN REFUSING TO PERMIT THE APPELLANT TO INSPECT HIS CONFESSION PRIOR TO TRIAL WAS PROPER.

Subsequent to Indictment and prior to the actual commencing of the appellant's trial, appellant made a motion pursuant to Rule 16 of the Federal Rules of Criminal Procedure, Title 18, U. S. C. After a hearing on the motion, and extensive argument, the trial Judge denied the appellant's motion to inspect a written statement signed by him, in which he admitted the crimes with which he was charged. Rule 16 of the Federal Rules of Criminal Procedure afford a defendant a limited right to pre-trial inspection for purposes of discovery. The Rule provides that the Court "may" rather than the Court "shall" direct inspection. It has been held that this language gives the trial Court discretion to deny inspection on grounds not exemplified in the Rule. See *United States v. Schneiderman,* 104 F.Supp. 405 (S.D. Cal. 1952).

The Rule has been interpreted as a departure from which had been allowed previously in criminal cases. See *Bowen Dairy Company v. United States,* 341 U.S. 214, 219 (1951). As stated by the appellant on page 34 of his brief, the numerical weight of decisions construing Rule 16, is that a defendant cannot require the Government to furnish him, prior to trial, with a copy of his statement or confession. Various reasons have been stated for denial of discovery under these circumstances. The United States District Court for the Northern District of Indiana, in the early case of *United States v. Black,* 6 FRD 270, 271 (1946), refused to allow the defendant to inspect statements made by him on the ground that Rule 16 applies only to those documents and objects which were in existence and in custody of the defendant prior to the Government's obtainment of them.

The United States Court of Appeals for the 8th Circuit and the 5th Circuit respectively, have held that Rule 16 cannot be interpreted to encompass a situation such as the one now before the Court. In *Shores v. United States,* 174 F.2d 838, 843 (8th Cir. 1949), the Court stated as follows:

> "In a general sense, of course, a confession may be regarded as a paper or document 'obtained' from the defendant. But reading the language of the rule in the light of the history involved in its formulation and in its context, we do not believe that such was its intended legal connotation and purpose here. The Notes of the Advisory Committee undertook to point out that it was doubtful whether discovery was permissible in criminal

cases under existing law, and then added, as to the intended scope of the formulated rule, the following: 'The courts have, however, made orders granting to the defendant an opportunity to inspect impounded documents belonging to him. * * * The rule is a restatement of this procedure. In addition, it permits the procedure to be invoked in cases of objects and documents obtained from others by seizure or by process, on the theory that such evidential matter would probably have been accessible to the defendant if it had not previously been seized by the prosecution. The entire matter is left within the discretion of the court'."

In the case of *Schaffer v. United States,* 221 F. 2d 17, 19, 20 (5th Cir. 1955), the Court stated:

"The appellant Schaffer insists that the court erred in denying his motion for the production of statements signed by him for the Naval authorities on or about June 24, 1952, and for the FBI agent on June 27, 1952, which statements were used in part in the dictation by the FBI agent, in Schaffer's presence, of the statement of July 10, 1952, signed by Schaffer, and which was introduced in evidence. A defendant's signed statement does not come within the purview of Rule 16 of the Federal Rules of Criminal Procedure as being a document in the custody of the defendant at the time the Government acquired possession of it. *Shores v. United States,* 8 Cir., 174 F.2d 838, 843, 844, 11 A.L.R. 2d 635. We think the breadth of the demand by defendant Schaffer marks it as a 'fishing expedition' designed to probe the strength of the Government's evidence in advance of trial and that the trial court properly

denied the motion of the defendant Schaffer for the production of such statements. See *United States v. Muraskin,* 2 Cir., 99 F.2d 815, 816; *United States v. Rosenfeld,* 2 Cir., 57 F.2d 74, 76, 77."

In the case of *United States v. Peltz,* 18 FRD 394 (SD NY 1955) Judge Herlands, in an exhaustive opinion, explored the history of Rule 16 and prior procedure, and comes to the conclusion that an oral statement of a defendant, reduced to writing by a Government stenographer, does not come within the provisions of Rule 16.

A host of other cases have interpreted Rule 16 as it relates to the case at bar and come to the same conclusion as the trial Judge did in the instant case. See *United States v. Patrisso et al.,* 20 FRD 576, 579 (SD NY 1957); *United States v. Malizia,* 154 F. Supp. 511 (SD NY 1957); *United States v. Kiamie,* 18 FRD 421 (SD NY 1955); *United States v. Chandler,* 7 FRD 365 (DC Mass. 1947); *United States v. Bennethum,* 21 FRD 227 (DC Del. 1957); and *United States v. Jannuzzio, et al.,* 22 FRD 223 (DC Del. 1958).

The trial Judge was correct in refusing, prior to trial, to allow the appellant to inspect a confession given by him to police officers and to Mr. Harkabus. This was proper, because this confession was not the property of the appellant and was not obtained from him within the meaning of Rule 16. In any event, this is a matter that lies within the sound discretion of the trial Judge. The trial Judge in this instance did not

abuse that discretion. Even if the trial Judge did abuse his discretion, it was harmless error. The record reflects that the statement in question was marked for identification and the appellant and his counsel had an opportunity to inspect and review the statement at the time of trial. At the time, the appellant could have requested a continuance to review the statement and this was not done. Also, it should be noted that the trial Judge refused to admit this statement into evidence and it was not used by the Government in obtaining the conviction in the instant case.

CONCLUSION.

For the reasons stated, there was no prejudicial error committed at the appellant's trial. Therefore, the verdict of the jury and judgment of the trial court should be affirmed.

Dated, Anchorage, Alaska,
December 30, 1958.

Respectfully submitted,

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